

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 21, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal Nos. 2016AP1553
2016AP1554
STATE OF WISCONSIN**

**Cir. Ct. Nos. 2016JV947
2016JV204**

**IN COURT OF APPEALS
DISTRICT I**

IN THE INTEREST OF T. T. H., A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

T. T. H.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Milwaukee County:
LINDSEY GRADY, Judge. *Affirmed.*

¶1 DUGAN, J.¹ In these consolidated appeals, T.T.H. appeals from non-final circuit court orders waiving juvenile court jurisdiction to adult court in two juvenile cases.² T.T.H. argues the trial court must give paramount consideration to the child's best interest in weighing the various criteria for waiver to adult court and that it is impossible to determine from the record if the court did so. Additionally, T.T.H. contends that the trial court failed to give sufficient and proper consideration to the suitability of T.T.H. receiving services in the Serious Juvenile Offender program ("S.J.O."). This Court disagrees and affirms the trial court's orders.

BACKGROUND AND PROCEDURAL HISTORY

¶2 On December 30, 2015, the State filed a petition in the circuit court, Milwaukee County, 2015-JV-947 (15JV), alleging that T.T.H., then sixteen years old, was delinquent. In support of its petition, the State alleged that on November 17, 2015, T.T.H. was a party to robbery with use of force in violation of WIS. STAT. §§ 943.32(1)(a), 939.05; aggravated battery in violation of WIS. STAT. §§ 940.19(6), 939.05; burglary of a building or dwelling in violation of WIS. STAT. §§ 943.10(1m)(a), 939.05; false imprisonment in violation of WIS. STAT. §§ 940.30, 939.05; and strangulation and suffocation in violation of WIS. STAT. §§ 940.235(1), 939.05. More specifically, the State alleged that T.T.H. and a co-actor knocked on the door of T.T.H.'s former landlord's home, and the two forced their way inside, knocking the victim into a room. The two repeatedly punched

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

² This court granted T.T.H.'s petitions for leave to appeal on August 9, 2016. On October 24, 2016, we granted T.T.H.'s motion to consolidate the appeals for briefing and disposition.

the victim in the face, knocking him down, and then kicked him in his side. At one point, T.T.H. came from behind the victim, placed him in a chokehold, and choked him until he became unconscious. When the victim came to, T.T.H. and his co-actor dragged him into the kitchen, asked where the safe was located, and demanded money. Every time the victim did not answer a question, he would get “stomped” on his back or kicked in his side. T.T.H. and the co-actor then dragged the victim into his bedroom, hit him again, and ransacked the room, along with the rest of the house. The victim identified T.T.H. as the primary aggressor. After approximately forty minutes, T.T.H. and his co-actor departed, taking two televisions, a cell phone, and approximately \$60. The victim was transported by ambulance to the hospital where he was treated for three broken ribs, a punctured lung, contusions to his face, and a hematoma to the right side of his head.

¶3 On February 15, 2016, the State filed a petition for waiver of juvenile court jurisdiction over T.T.H., pursuant to WIS. STAT. § 938.18. In support of its petition for waiver, the State asserted that:

[t]he juvenile was previously adjudicated delinquent and served one year probation for Att. Theft (reduced from Attempted Robbery), and Attempted Battery, in Circuit Ct. Case No. 13jv1120; the treatment he received for these offenses did not dissuade or otherwise prevent this juvenile from again engaging in significantly more violent offenses.

It asserted that this fact together with the number and the nature of the new charges, including premeditation and brutality, required a significant system response to hold T.T.H. accountable and to provide a sufficient time for rehabilitation, and to protect the community.

¶4 Ultimately, T.T.H. was returned to his home with conditions, including a twenty-four-hour curfew. While on release and with a twenty-four-

hour curfew, T.T.H. engaged in conduct which resulted in the State filing a second delinquency petition on March 3, 2016, in the circuit court, Milwaukee County, 2016-JV-204 (16JV). In support of the petition, the State alleged that on March 1, 2016, T.T.H. was a party to armed robbery with threat of force in violation of WIS. STAT. §§ 943.32(1)(b) and (2), 939.05; operating a motor vehicle without owner's consent in violation of WIS. STAT. §§ 943.23(2), 939.05; and false imprisonment in violation of WIS. STAT. §§ 940.30, 939.05; and on March 2, 2016, operating a motor vehicle without owner's consent in violation of WIS. STAT. § 943.23(3).

¶5 More specifically, the State alleged that the victim reported that at 11:00 p.m., she drove to a location to pick up T.T.H. and give him a ride back to the north side. She stated that she had picked T.T.H. up three times in the past because she wanted to help him and also make some money. T.T.H. offered to pay her \$25 for picking him up. When she arrived at the location, T.T.H. got into the front passenger seat and a second individual entered the backseat. After driving a short distance, T.T.H. told her to stop, which she did. T.T.H. grabbed her keys out of the ignition, stated, “come on, bro,” and then the co-actor in the backseat grabbed the victim around the neck. T.T.H. pointed a gun at her and told her she needed to get out of the car. The co-actor then “snatched her” into the backseat and T.T.H. began driving. As they were driving along, both males were punching her and the co-actor was choking her.

¶6 The victim told police that T.T.H. said he was going to shoot and kill her, and that he was “driving crazy.” Additionally, during the ride, the co-actor sexually assaulted her, touching her breasts and vagina. Finally, the two males stopped the car and pushed her out. She then called the police on her cell phone.

¶7 On March 2, 2016, officers spotted her stolen vehicle. T.T.H. was driving the vehicle. He fled from the officers, lost control of the vehicle, and “crashed into a light post.” He was then taken into custody.

¶8 On March 3, 2016, the State filed a petition for waiver of juvenile court jurisdiction over T.T.H. pursuant to WIS. STAT. § 938.18. Both of the juvenile cases against T.T.H. were set for a final status conference on June 30, 2016. On that date, the trial court found prosecutive merit with respect to both petitions, and the matters were set for waiver hearing on July 26, 2016. During the waiver hearing, juvenile probation officers Matthew Garrett and Christeen Oberdas testified, and the trial court received exhibits and took judicial notice of the juvenile files in 15JV, 16JV, and 13-JV-1120.

¶9 Garrett testified that he was T.T.H.’s probation officer in a prior juvenile case from 2013 and had supervised him between November 2013 and January 2015. Garrett also testified about services that T.T.H. received with respect to his cases and that T.T.H. appeared to be immature. Oberdas testified about her supervision of T.T.H. between December 2015 and the hearing date. She also testified regarding the S.J.O. and about certain programs that were available to T.T.H.

¶10 At the conclusion of the waiver hearing, the trial court found by clear and convincing evidence that it would be contrary to the juvenile’s best interest or the best interest of the public to hear the case in juvenile court, for reasons discussed below. By orders dated July 26, 2016, the trial court granted the waiver petitions in 15JV and 16JV. These appeals follow.

STANDARD OF REVIEW

¶11 Our supreme court has set forth the standard of review for a juvenile waiver appeal:

The decision to waive juvenile court jurisdiction under WIS. STAT. § 938.18 is committed to the sound discretion of the juvenile court. We will reverse the juvenile court's decision to waive jurisdiction only if the court erroneously exercised its discretion. A juvenile court erroneously exercises its discretion if it fails to carefully delineate the relevant facts or reasons motivating its decision or if it renders a decision not reasonably supported by the facts of record. In reviewing the juvenile court's discretionary decision to waive jurisdiction, we look for reasons to sustain the court's decision.

State v. Tyler T., 2012 WI 52 ¶24, 341 Wis. 2d 1, 814 N.W.2d 192 (citations omitted). Additionally, the trial court must exercise its discretion, considering each of the criteria laid out in WIS. STAT. § 938.18(5). However, it is within the trial court's discretion how much weight should be afforded each of the factors under the statute. See *J.A.L. v. State*, 162 Wis. 2d 940, 960, 471 N.W.2d 493 (1991).

ANALYSIS

¶12 T.T.H. argues the trial court must give paramount consideration to the child's best interest in weighing the various criteria for waiver to adult court and that it is impossible to determine from the record if the trial court did so. Additionally, T.T.H. contends that the trial court failed to give sufficient and proper consideration to the suitability of T.T.H. receiving services in the S.J.O.

A. The Best Interest of the Child is not the Paramount Consideration in Determining Waiver.

¶13 The parties disagree on the legal standard that the trial court should apply in waiver-to-adult-court cases. Citing *State v. C.W.*, 142 Wis. 2d 763, 767, 419 N.W.2d 327 (Ct. App. 1987) and *State v. Elmer J.K., III*, 224 Wis. 2d 372,

384, 591 N.W.2d 176 (Ct. App. 1999), T.T.H. asserts that, “the court must exercise discretion by analyzing each of the statutory factors, placing that analysis on the record, and keeping in mind ‘... that the best interest of the child is the paramount consideration.’” In response, the State asserts that prior court rulings that held that the best interest of the child is the paramount consideration in a waiver case were based upon the language in an earlier version of WIS. STAT. § 48.01 and that statute is no longer applicable. The State goes on to argue that the language in WIS. STAT. § 48.01(3) stating that “the best interest of the child must be considered paramount” was repealed and replaced by WIS. STAT. § 938.01.

¶14 This court agrees with the State. Previous versions of the waiver statute were located in the Children’s Code, which instructs trial courts to make the child’s best interest the “paramount consideration” in construing its provisions. WIS. STAT. § 48.01(2). However, it is now found in Chapter 938, the Juvenile Justice Code. This chapter directs that protection of the public and treatment of the juvenile’s needs are “equally important purposes” of the code. See WIS. STAT. § 938.01(2)(a) and (f). WIS. STAT. § 938.01 provides:

(1) TITLE. This chapter may be cited as “The Juvenile Justice Code,” and shall be liberally construed in accordance with the objectives expressed in this section.

(2) LEGISLATIVE INTENT. It is the intent of the legislature to promote a juvenile justice system capable of dealing with the problem of juvenile delinquency, a system which will protect the community, impose accountability for violations of law and equip juvenile offenders with competencies to live responsibly and productively. To effectuate this intent, the legislature declares the following to be *equally important purposes* of this chapter:

(a) To protect citizens from juvenile crime.

- (b) To hold each juvenile offender directly accountable for his or her acts.
- (c) To provide an individualized assessment of each alleged and adjudicated delinquent juvenile, in order to prevent further delinquent behavior through the development of competency in the juvenile offender, so that he or she is more capable of living productively and responsibly in the community.
- (d) To provide due process through which each juvenile offender and all other interested parties are assured fair hearings, during which constitutional and other legal rights are recognized and enforced.
- (e) To divert juveniles from the juvenile justice system through early intervention as warranted, when consistent with the protection of the public.
- (f) To respond to a juvenile offender's needs for care and treatment, consistent with the prevention of delinquency, each juvenile's best interest and protection of the public, by allowing the court to utilize the most effective dispositional option.
- (g) To ensure that victims and witnesses of acts committed by juveniles that result in proceedings under this chapter are, consistent with this chapter and the Wisconsin constitution, afforded the same rights as victims and witnesses of crimes committed by adults, and are treated with dignity, respect, courtesy, and sensitivity throughout those proceedings.

(Emphasis added.) Section 938.01(2) explicitly states, “to effectuate this intent, the legislature declares the following to be *equally* important purposes of this chapter” and does not include any reference to the best interest of the child being paramount as one of those criteria.

¶15 Based on the creation of WIS. STAT. § 938.01, the court concludes that the best interest of the child is not the paramount consideration in a waiver determination.

B. The Trial Court Properly Exercised its Discretion in Considering the Criteria Set Forth in WIS. STAT. § 938.18(5)(c).

¶16 With respect to the adequacy and suitability of facilities, services, and procedures available for treatment of the juvenile and protection of the public within the juvenile justice system, T.T.H. acknowledges that in rendering its orders waiving jurisdiction over him, the trial court specifically discussed the criteria set forth in WIS. STAT. § 938.18(5) and that the parties conceded the existence of most of the factors under the statute. Rather, he states that the focus of the appeal is the determination of the adequacy and suitability of services and facilities available in the juvenile system, and the interaction of the need to protect the public. T.T.H. does not claim any other potential error in the trial court's analysis of the other criteria set forth in the statute.

¶17 T.T.H. argues that the trial court did not properly apply the criteria set forth in WIS. STAT. § 938.18(5)(c), which requires that the court consider:

the adequacy and suitability of facilities, services, and procedures available for treatment of the juvenile and protection of the public within the juvenile justice system, and, where applicable, the mental health system and the suitability of the juvenile for placement in the Serious Juvenile Offender program under S. 938.538 or the Adult Intensive Sanctions program.

However, T.T.H. concedes:

The facts upon which the court based the waiver determination are essentially undisputed. T.T.H. recognizes that in every sense this was a very close determination as to whether waiver was appropriate. It is conceded that [the] question of whether waiver was appropriate, turned on the issue of adequacy and suitability of facilities, services, and procedures of treatment of juveniles. Sec. 938.18(5)(c). The evidence produced at the hearing regarding the other waiver criteria, was not in dispute.

¶18 In this case, the trial court undertook a detailed analysis of the statutory factors. In beginning its analysis, the trial court noted that the State had the burden of proving that it is contrary to the best interest of the juvenile or the public for the juvenile court to hear the case. In other words, it noted that the State did not have to prove that it was contrary to both the juvenile's best interest and the public's best interest, but rather, either interest. The trial court also noted that the State's burden was to establish by clear and convincing evidence that it is contrary to the best interest of the juvenile or the public to hear the case in juvenile court.

¶19 Although T.T.H. focuses on WIS. STAT. § 938.18(5)(c), and the availability of the S.J.O., the trial court has the discretion to determine how much weight it will afford to each factor under WIS. STAT. § 938.18(5). See *J.A.L.*, 162 Wis. 2d at 960. To that extent the trial court's analysis of the criteria, ultimately focused upon the facility, services, and procedures available for treatment of T.T.H. in the juvenile justice system, the protection of the public under those circumstances, and the criteria under subsection (b) of the statute. WIS. STAT. § 938.18(5)(b) requires that the court consider "the type and seriousness of the offense, including whether it was against persons or property and the extent to which it was committed in a violent, aggressive, premeditated or willful manner." While discussing both treatment and protection within the juvenile system, the trial court also addressed the seriousness of the offenses set forth in the petitions for waiver. The trial court's analysis reflects a careful balancing of available treatment and the protection of the community.

¶20 The trial court reviewed the evidence regarding T.T.H.'s need for treatment and the treatment that he had received, noting that he had received some AODA treatment, which the trial court believed should continue to be available. It

also noted as far as T.T.H.'s treatment history went, it involved some cognitive intervention programs, such as Running Rebels, and behavioral type programs that he underwent in his prior supervision, but none of those factors were at issue in the current case. Additionally, the trial court stated that there was potential for T.T.H. to respond to future treatment, but it was concerned there were negatives during his past treatment, including T.T.H.'s failure in the mentor programming, the disconnect with some of the Level 2 programming, and ongoing school issues.

¶21 Discussing T.T.H.'s prior record, the trial court noted that he had been adjudicated for attempted theft and attempted battery, both as party to a crime. The trial court expressed its concern that the party to a crime showed more planning and willfulness, than would participation in a spontaneous large group. It commented that, "[w]hen you are talking about one or two people and the alleged actions are as dangerous and severe, the degree of involvement I think is higher." The trial court then addressed the fact that, although two years had passed from T.T.H.'s first offense, the cases before the trial court occurred less than six months apart. It also stated that the 15JV case was filed, that T.T.H. was aware that a waiver petition had been filed, that T.T.H. was aware that he was facing the potential of forty-five years in prison, and that he was on electronic monitoring with a twenty-four-hour curfew. The trial court then noted that, despite all of that, he chose to engage in the conduct that resulted in the filing of 16JV. The trial court then concluded, "[i]t's aggravating in the greatest degree, and it just smacks of willfulness because there were so many red flags or things wa[i]ving to say don't go, don't do it, we're all telling you."

¶22 Addressing the seriousness of the offense and whether the crime was against person or property, and the degree of violence and willfulness, the trial court stated, "[t]his is certainly the most aggravating of the waiver criteria."

Further, the trial court noted that the petitions dealt with crimes against people and the crimes were dangerous, violent, and destructive in relation to the victims. The trial court then commented that the crimes were more dangerous and willful because of the vulnerability of the victims because T.T.H. knew them, the planning of the crimes, and the abuse of trust. Further, the trial court stated that those factors were “very frightening when a [c]ourt looks at protecting the public.” The trial court went on to note that as to the victim in 16JV, T.T.H. had established a trustful relationship and “it was almost akin to grooming in the sense of make sure there was enough of a pattern of good will, good relationship, so that when you chose to strike at her, allegedly in the criminal context, it was an easy crime to commit.” The trial court further noted the degree of violence and the sexual assault of that victim was facilitated and aggravated by T.T.H.’s use of a firearm to commit the crime. The trial court also addressed the danger to the whole community because T.T.H. drove at high speeds while fleeing from the police in the stolen vehicle.

¶23 Addressing the victim in 15JV, the trial court highlighted that he was an elderly gentleman and his injuries were severe. It also noted that the acts were very violent and took place in his home, which is a special place for any victim. It also noted that both incidents were planned and not spontaneous. Finally, the trial court stated that not only must the court consider the seriousness of the offense, but also the degree of willfulness, and the degree of violence.

¶24 Having concluded that the type and seriousness of the offense was the most aggravating factor, the trial court then considered the adequacy and suitability of the facilities and the services. The trial court noted, “[t]he S.J.O. is really what we’re talking about.” The trial court stated that in the S.J.O., there would be all of the programs available in the juvenile justice system to deal with

behavior and how to think differently and how to look at the world differently. It also went on to say, “that’s why the juvenile system is good, because it takes kids whose brains are still developing and functioning, and it teaches them how to use them better. That’s why we like it. That’s why the juvenile system is different.” The trial court then concluded that T.T.H. would benefit from the S.J.O. and the juvenile system programs.

¶25 However, the trial court then stated, “the question is whether he is suitable for that and then balancing that with the protection of the public. And, quite frankly, that’s really the concern that the court has ultimately.” At that point, the trial court explained its reasoning:

[a]nd so when the other four factors were easily satisfied as far as the appropriateness and applicability of the waiver, the [c]ourt went back to the S.J.O. potential and the, quite frankly, suitability and goodness of the juvenile programs, and struggled with whether or not that window of time was enough given what I think would be helpful as far as those juvenile programs.

The trial court then concluded that, despite the availability of the juvenile programs, those programs did not outweigh the other factors and the other concerns that demonstrated that waiver was necessary. It explained that under the S.J.O., T.T.H. would only be subject to a maximum of five years: three years of incarceration, followed by two years of supervision. Considering the seriousness of the offenses and T.T.H.’s treatment needs, the trial court concluded that a five-year period was not a sufficient time to address T.T.H.’s needs and to protect the public. The trial court then concluded that, “there was no question that clear and convincing evidence was shown and provided that it is contrary to the best interest of the public to hear this case in juvenile court. And that’s given all of the criteria

that the [c]ourt has set forward.” It then granted the petitions for waiver of juvenile court jurisdiction.

¶26 The trial court concluded that the type and seriousness of the offense was the most aggravating factor, it then considered the adequacy and suitability of the facilities and the services, and concluded he would benefit from the juvenile programs. However, the trial court then stated, “the question is whether he is suitable for that and then balancing that with the protection of the public.” In the end, the trial court concluded that a five-year period was not a sufficient time to address T.T.H.’s needs and to protect the public. Based on the evidence and the applicable law, this court concludes that the trial court considered and applied the criteria under WIS. STAT. § 938.18(5) and reasonably determined on the record that it was established by clear and convincing evidence that waiver would be in the best interest of the public. Thus, this court concludes that the trial court did not erroneously exercise its discretion in waiving juvenile jurisdiction.

By the Court.—Orders affirmed.

This order will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

